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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MARK ANTHONY AURIGEMMA, Appellant.	)	2 CA-CR 2009-0028 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR2008000105

Honorable James L. Conlogue, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Joseph L. Parkhurst — Tucson
Attorneys for Appellee

Anson Poliquin, PLLC
By Angela C. Poliquin — Tucson

and

Jeffrey G. Buchella — Tucson
Attorneys for Appellant

E S P I N O S A, Presiding Judge.

¶1 After a jury trial, appellant Mark Aurigemma was convicted of first-degree burglary, aggravated assault with a dangerous instrument, and unlawful imprisonment. The trial court sentenced him to 10.5 years' imprisonment for the burglary conviction, a five-year term for aggravated assault, and 1.5 years for unlawful imprisonment. The court ordered the aggravated assault and unlawful imprisonment sentences to run concurrently with each other but consecutively to the burglary sentence. On appeal, Aurigemma argues the court erred by imposing consecutive sentences. Finding no error, we affirm.

Factual Background and Procedural History

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). In February 2008, Aurigemma and three others, Brent Mulvaney, Cassie Conner, and Luis Ortega, drove to V.C.'s home looking for her boyfriend, T.E. Aurigemma testified that the purpose of the visit was to collect on a drug debt that T.E. owed to Mulvaney. The group parked some distance from V.C.'s trailer and, before approaching the door, disconnected V.C.'s telephone lines. Mulvaney then began knocking on the door with increasing intensity.

¶3 V.C., who had been about to have dinner with her three children and T.E., answered the door, and the group forced its way into the home, shouting and demanding money from T.E. V.C. repeatedly yelled at them to leave. Aurigemma and Ortega began beating T.E. with a police baton and a baseball bat, while Conner made her way through

the home, collecting valuables. After V.C. confronted Conner and took back one of the items, Conner said either "hit her" or "get her." Ortega proceeded to strike V.C. in the face with the baseball bat, causing severe injury and disfigurement.[1]

¶4 Following a nine-day jury trial, Aurigemma was convicted of first-degree burglary, aggravated assault of T.E. with a police baton, and unlawful imprisonment of T.E., and he was sentenced as outlined above.[2] We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶5 Aurigemma contends the trial court improperly imposed consecutive sentences for first-degree burglary and the other two convictions because all three charges arose from a single act. Section 13-116, A.R.S., prohibits the imposition of consecutive sentences for offenses arising out of a single "act or omission." We review de novo whether consecutive sentences are permissible under § 13-116. *State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006).

¶6 To determine whether conduct constitutes a single act for purposes of § 13-116, we apply the following test set forth by our supreme court in *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989):

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[1]As a result of the attack, portions of V.C.'s skull were shattered, and she lost an eye.

[2]Aurigemma was acquitted of theft, attempted second-degree murder of V.C., aggravated assault of T.E. with a baseball bat, aggravated assault of V.C. with a baseball bat, aggravated assault of V.C. by causing serious physical injury, and unlawful imprisonment of V.C. and her children.

> [W]e will . . . judge a defendant's eligibility for consecutive sentences by considering the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges. If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible under A.R.S. § 13-116. In applying this analytical framework, however, we will then consider whether, given the entire "transaction," it was factually impossible to commit the ultimate crime without also committing the secondary crime. If so, then the likelihood will increase that the defendant committed a single act under A.R.S. § 13-116. We will then consider whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime. If so, then ordinarily the court should find that the defendant committed multiple acts and should receive consecutive sentences.

State v. Anderson, 210 Ariz. 327, ¶ 140, 111 P.3d 369, 400 (2005), *quoting Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (alterations in *Anderson*).

¶7 Under the first part of the *Gordon* analysis, we initially determine whether first-degree burglary or aggravated assault was "the 'ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges.'" *Urquidez*, 213 Ariz. 50, ¶ 7, 138 P.3d at 1179, *quoting Gordon*, 161 Ariz. at 315, 778 P.2d at 1211; *see also State v. Alexander*, 175 Ariz. 535, 537, 858 P.2d 680, 682 (App. 1993) (ultimate crime "will usually be the primary object of the episode").[3] Aurigemma contends aggravated assault was the ultimate crime, while the state maintains the trial court correctly determined first-degree burglary was the ultimate crime. The state also

[3]Aurigemma concedes that false imprisonment was not the ultimate offense.

points out that first-degree burglary of a residential structure, a class two felony, is a more serious charge than aggravated assault, a class three felony. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (ultimate charge "will often be the most serious of the charges"); *see also* A.R.S. §§ 13-1204(B), 13-1508(B).

¶8 As part of our determination of the ultimate crime, we note the elements necessary for the first-degree burglary conviction. A person commits residential burglary by "entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or felony therein." A.R.S. § 13-1507(A). In order to commit first-degree burglary, however, a person or accomplice must violate § 13-1507 and "knowingly possess[] explosives, a deadly weapon or a dangerous instrument in the course of committing any theft or any felony." § 13-1508(A). Therefore, although a conviction for residential burglary requires only the intent to commit a theft or felony, first-degree burglary requires the actual commission of a theft or felony. Considering these elements here, we conclude first-degree burglary is the ultimate charge because it is the more serious one and also encompasses more of the factual events that occurred that evening, including the aggravated assault.

¶9 We next subtract the evidence necessary to convict on that charge and determine whether the remaining evidence is sufficient to obtain a conviction for aggravated assault. *See State v. Carreon*, 210 Ariz. 54, ¶ 104, 107 P.3d 900, 920 (2005); *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. As set forth above, first-degree burglary requires a person to enter or remain unlawfully in a residential structure with the intent to

commit any theft or felony therein while the person or an accomplice knowingly possesses a deadly weapon or dangerous instrument in the course of committing a theft or felony. §§ 13-1507(A), 13-1508(A). A person commits aggravated assault by "[i]ntentionally, knowingly or recklessly causing physical injury to another person," A.R.S. § 13-1203(A)(1), while using a deadly weapon or dangerous instrument, A.R.S. § 13-1204(A)(2).

¶10 After subtracting all facts necessary to the commission of first-degree burglary, we must determine whether the remaining evidence supports Aurigemma's conviction for aggravated assault. Aurigemma argues there is insufficient evidence of aggravated assault after subtracting the evidence necessary for the first-degree burglary conviction because "the key element of the first-degree burglary, commission of a felony while possessing a dangerous [instru]ment, . . . covers the elements of the aggravated assault," namely, Aurigemma's use of the police baton.

¶11 Aurigemma's argument, however, ignores Ortega's use of the baseball bat to beat T.E. As the trial court correctly explained, it was not necessary to consider the police baton, because Aurigemma's "accomplice also possessed a baseball bat" in connection with the first-degree burglary. This is consistent with the jury's verdict, which found Aurigemma guilty of "entering or remaining unlawfully in . . . a residential structure with the intent to commit a theft or any felony therein, while [he] *or an accomplice* possessed a deadly weapon or a dangerous instrument, to wit: *a baseball bat and police baton*, in the course of committing any felony." (Emphasis added.) As set

forth in *Gordon*, we "subtract[] from the factual transaction the evidence *necessary to convict on the ultimate charge*" rather than all evidence that might be relevant to the elements of the charge. *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (emphasis added). Because Ortega used the baseball bat to assault T.E., the trial court correctly concluded it is possible to subtract the evidence necessary for the first-degree burglary conviction without subtracting Aurigemma's use of the police baton.[4] Therefore, application of the first *Gordon* factor suggests consecutive sentences were permissible.

¶12 Proceeding to the next part of the *Gordon* test, we consider whether "'it was factually impossible to commit the ultimate crime without also committing the secondary crime.'" *Anderson*, 210 Ariz. 327, ¶ 140, 111 P.3d at 400, *quoting Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. Considering the factual episode as a whole, the evidence demonstrated that Aurigemma and his codefendants could have entered the residence and demanded money, and Ortega could have beaten T.E., without Aurigemma's also beating T.E., as happened here. Thus, again due to Ortega's actions, it was possible for Aurigemma and his accomplices to commit the first-degree burglary

[4]We note Aurigemma only marginally addressed this issue in his brief and failed to present persuasive argument or relevant authority contravening this result, even though it was the primary basis for the trial court's ruling. Although the state offered two alternative theories for affirming Aurigemma's consecutive sentences apart from the one relied upon by the trial court, the state at oral argument agreed with the theory employed by the trial court.

without Aurigemma also committing aggravated assault. This factor, too, supports the imposition of consecutive sentences.[5]

¶13 There is no need to proceed to the third *Gordon* factor because our analysis of the first two factors has demonstrated that Aurigemma's conduct constituted multiple acts. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (if analysis of first and second factors indicates a single act under § 13-116, court "will then consider" third factor); *see*

[5]In addition to the trial court's analysis, the state sets forth an alternative resolution for this issue, contending the elements of first-degree burglary require the defendant or accomplice to "(1) enter or remain unlawfully (2) in a residential structure (3) with the intent to commit any theft or any felony therein (4) and knowingly possessing explosives, a deadly weapon, or a dangerous instrument." But this fails to include an element contained in § 13-1508(A): that the possession of explosives, a deadly weapon, or a dangerous instrument be "in the course of committing any theft or any felony." Because the state's analysis omits this element, it incorrectly concludes that Aurigemma's mere possession of the police baton while intending to commit a felony is sufficient for his first-degree burglary conviction. The state's error may be understandable, as some cases have failed to identify this element specifically. *See, e.g.*, *Carreon*, 210 Ariz. 54, ¶ 105, 107 P.3d at 920 ("A person commits burglary in the first degree by violating the provisions of A.R.S. § 13-1507 (2001) and knowingly possessing a deadly weapon."). However, we must give effect to the clear language of the statute, *see State v. Aguilar*, 218 Ariz. 25, ¶ 45, 178 P.3d 497, 509-10 (App. 2008), and therefore reject the state's analysis.

At oral argument, the state offered yet another theory, arguing that because Aurigemma had knowingly possessed the police baton while committing his unlawful imprisonment of T.E., this separate offense could be viewed as the felony necessary for first-degree burglary. The state conceded, however, that the record is unclear as to when the offense of unlawful imprisonment occurred, and Aurigemma's counsel argued it had occurred simultaneously with Aurigemma's aggravated assault of T.E. What the record does clearly demonstrate, however, is that, during sentencing, the state maintained that the aggravated assault and unlawful imprisonment sentences should be concurrent, not consecutive, indicating it conceded these offenses arose out of a single act for purposes of § 13-116. Based on this concession, we reject the state's suggestion and its alternate theory.

also Anderson, 210 Ariz. 327, ¶ 143, 111 P.3d at 400 (determining offenses were not single act under § 13-116 after completing second part of *Gordon* analysis); *Carreon*, 210 Ariz. 54, ¶¶ 104-06, 107 P.3d at 920-21 (same); *State v. Boldrey*, 176 Ariz. 378, 382-83, 861 P.2d 663, 667-68 (App. 1993) (explaining *Gordon* does not require reaching third factor if consecutive sentences are permissible under first two factors); *accord Urquidez*, 213 Ariz. 50, ¶ 9, 130 P.3d at 1179 (court proceeded to final *Gordon* factor because analysis of first and second factors not determinative). *But see State v. Roseberry*, 210 Ariz. 360, ¶¶ 58-62, 111 P.3d 402, 412-13 (2005) (reaching third part of *Gordon* analysis without discussion even though first two factors supported consecutive sentences); *Anderson*, 210 Ariz. 327, ¶ 144, 111 P.3d at 400-01 (same); *State v. Runningeagle*, 176 Ariz. 59, 67, 859 P.2d 169, 177 (1993) (same). Accordingly, we conclude consecutive sentences were permissible under *Gordon* and § 13-116.

Disposition

¶14 Aurigemma's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge